

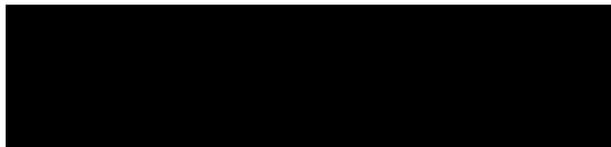
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U. S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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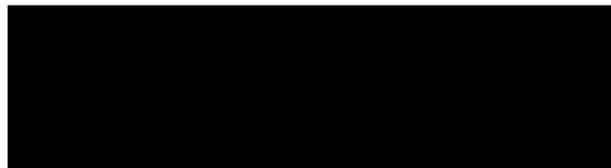
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IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Act,
8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Baltimore, Maryland. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a controlled substance violation. The applicant seeks a waiver of inadmissibility under section 212(h), 8 U.S.C. § 1182(h), in order to reside in the United States with his U.S. Citizen spouse and child.

The District Director determined that the applicant failed to establish extreme hardship to a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly. *Decision of the District Director*, dated January 28, 2008.

On appeal, counsel asserts that the applicant's qualifying relatives will experience extreme hardship if the applicant is denied admission to the United States. *Appeal Brief*, undated.

The AAO conducts the final administrative review and enters the ultimate decision for U.S. Citizenship and Immigration Services on all immigration matters that fall within its jurisdiction. The AAO reviews each case de novo as to all questions of law, fact, discretion, or any other issue that may arise in an appeal that falls under its jurisdiction. See *Helvering v. Gowran*, 302 U.S. 238, 245-246 (1937); see also, [REDACTED] v. *United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

Section 212(a)(2)(C) of the Act provides, in pertinent part, that:

Controlled Substance Traffickers - Any alien who the consular officer or the Attorney General knows or has reason to believe--

- (i) is or has been an illicit trafficker in any controlled substance or in any listed chemical (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), or is or has been a knowing aider, abettor, assister, conspirator, or colluder with others in the illicit trafficking in any such controlled or listed substance or chemical, or endeavored to do so . . . is inadmissible.

The phrase "any illicit trafficking in any controlled substance" includes any unlawful trading or dealing in any controlled substance. See *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992). In *Matter of Rico*, 16 I&N Dec. 181 (BIA 1977), the BIA determined that an alien was inadmissible into the United States pursuant to section 212(a)(23) of the Act, currently section 212(a)(2)(C), because he attempted to smuggle 162 pounds of marijuana into the United States. The BIA concluded that in light of the large quantity of marijuana involved, it was not intended for personal use, and the alien is an illicit trafficker as contemplated by the statute. *Id* at 186. Similarly, in *Matter of P-*, 5 I&N Dec. 190 (BIA 1993), the BIA concluded that an illicit trafficker in controlled substances is a person who

purchases or possesses any controlled substance for purposes of resale in the United States.

In *Matter of Rico*, the BIA noted that a finding of excludability must be based upon “reasonable, substantial, and probative evidence.” 26 I&N Dec. at 185; *see also Alarcon-Serrano v. I.N.S.*, 220 F.3d 1116, 1119 (9th Cir. 2000)(stating that a “reason to believe” an alien has engaged in conduct that renders him inadmissible under section 212(a)(2)(C) must be supported by “reasonable, substantial, and probative evidence.”). Conversely, it is the applicant’s burden to establish that he is admissible. *See* Section 291 of the Act, 8 U.S.C. § 1361.

Upon review, the record supports that the applicant is inadmissible under section 212(a)(2)(C)(i) of the Act, as there is “reason to believe” that the applicant has been an illicit trafficker in a controlled substance. The affidavit from the police detective that arrested the applicant states that on January 20, 2001, the applicant committed the offense of criminal sale of marijuana, criminal possession of marijuana and unlawful possession of marijuana. The affidavit states that the applicant reached into a black bag directly underneath him, removed four bags of marijuana, and gave an individual the bags of marijuana in exchange for \$20.00. The detective recovered 44 bags of marijuana from a black bag directly underneath the applicant and one bag of marijuana from the applicant’s right front pant’s pocket. *Affidavit of Detective [REDACTED] Narcotics Division East Harlem*, dated January 20, 2001.

The record reflects that the applicant was charged with criminal sale of marihuana in the fourth degree in violation of New York Penal Law § 221.40, criminal possession of marihuana in the fifth degree in violation of New York Penal Law § 221.10 and unlawful possession of marihuana in violation of New York Penal Law § 221.05. The applicant was convicted in the Criminal Court of the City of New York, County of New York of unlawful possession of marihuana, and ordered to pay a \$200 fine. (Docket No. [REDACTED])

The AAO finds that based on the quantity of marijuana discovered in the applicant’s car, and the evidence that he was engaged in the sale of the substance, the record contains reasonable, substantial, and probative evidence of his drug-trafficking activities. The detectives had a reason to believe that the applicant was an illicit drug-trafficker or at least a knowing assister, abettor, conspirator, or colluder with others in the illicit drug-trafficking business. Accordingly, we conclude that the applicant is inadmissible under section 212(a)(2)(C) of the Act. There is no waiver available for inadmissibility under section 212(a)(2)(C) of the Act.

The AAO notes that the applicant is also inadmissible under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II), for having committed a crime related to a controlled substance, for which there is a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h). Section 212(a)(2)(A)(i) of the Act states in pertinent part:

- (1) Criminal and related grounds. —
 - (A) Conviction of certain crimes. —

- (i) In general. – Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
 - (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
 - (II) a violation of (or conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), is inadmissible.

Section 212(h) of the Act provides, in pertinent part, that:

The Attorney General may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), (D), and (E) or subsection (a)(2) and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana

- (1) (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The applicant was convicted of unlawful possession of marihuana in violation of New York Penal Law § 221.05. The only waiver available for a controlled substance offense is under section 212(h) of the Act for simple possession of 30 grams or less of marijuana.

Former counsel asserted in a motion to reopen that the applicant “pled guilty to Section 221.05 which is the lowest offense level of possession, not considered criminal, called a violation.” Former counsel explained that “[t]he amount is labeled as ‘any amount,’ by inference the amount is any amount up to 25 grams. . . . [b]ecause the next degree is a class B misdemeanor or the 5th level which is considered ‘criminal possession’ of Marijuana and begins with 25 grams of Marijuana up to the next level which is 2 ounces.” *Motion to Reopen*, dated May 1, 2006.

At the time of the applicant’s conviction, New York Penal Law § 221.05 provided, in pertinent part,

A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana. Unlawful possession of marihuana is a violation punishable only by a fine of not more than one hundred dollars. However, where the defendant has previously been convicted of an offense defined in this article or article

220 of this chapter, committed within the three years immediately preceding such violation, it shall be punishable (a) only by a fine of not more than two hundred dollars, if the defendant was previously convicted of one such offense committed during such period, and (b) by a fine of not more than two hundred fifty dollars or a term of imprisonment not in excess of fifteen days or both, if the defendant was previously convicted of two such offenses committed during such period.

The BIA stated that in determining whether an offense relates to a simple possession of 30 grams or less of marijuana, a categorically inquiry of the offense would obviously be insufficient. *Matter of Espinoza*, 25 I&N Dec. 118, 124-25 (BIA 2009)(stating “we conclude that Congress envisioned something broader, specifically, a factual inquiry into whether an alien's criminal conduct bore such a close relationship to the simple possession of a minimal quantity of marijuana.”). On appeal, counsel asserts that the applicant was “convicted of a single offense of simple possession of marijuana. The undersigned counsel has requested a certified court disposition and copy of the lab report from the Criminal Court of the City of New York and the documents are forthcoming.” The AAO notes that as of the date of this decision, the applicant has not submitted the laboratory report related to this conviction.

Furthermore, the affidavit from the police detective reveals that the applicant was not convicted of simple possession of 30 grams or less of marijuana. The BIA in *Moncada-Servellon* viewed the legislative history of the exception to deportability for possession of marijuana under section 237(a)(2)(B)(i) of the Act, and noted that “Congress was concerned with alleviating the consequences of only ‘minor’ offenses involving the ‘simple possession’ of small amounts of marijuana. It also confirms that the concepts of ‘simple possession’ and ‘possession ... for one's own use’ were understood by Congress to be interchangeable, rather than contradictory.” 24 I. & N. Dec. 62, 67 (BIA 2007). In this case, the evidence shows applicant had on his possession 44 bags of marijuana, and he was engaged in selling four additional bags. *See Affidavit of Detective [REDACTED]* dated January 20, 2001. The applicant’s offense was not within the legislative intent for the application of “simple possession.”

Finally, even if the applicant were eligible for a section 212(h) of the Act waiver of the ground of inadmissibility arising under section 212(a)(2)(A) of the Act, he would nevertheless be inadmissible under section 212(a)(2)(C) of the Act, for which there is no waiver available. Accordingly, the AAO finds the applicant is statutorily ineligible for a waiver, and the appeal will be dismissed.

Section 291 of the Act, 8 U.S.C. § 1361, provides that the burden of proof is on the applicant to establish eligibility for the benefit sought. Here, the applicant has not met that burden. The appeal will therefore be dismissed and the Form I-601 will be denied.

ORDER: The appeal is dismissed.